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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. NOHELY STEPHANY ROLDAN, Defendant and Appellant.	H043767 (Monterey County Super. Ct. No. SS141673)

Defendant Nohely Stephany Roldan was granted probation after she pleaded no contest to second degree burglary (Pen. Code, § 459). She contends that three probation conditions relating to her use of electronic devices are invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), unconstitutionally overbroad, and unconstitutionally vague. We conclude that the probation conditions are unconstitutionally vague and reverse the order for further proceedings.

I. Statement of Facts

On March 24, April 8, and June 10, 2014, defendant used a fraudulent credit card to book rooms at the Best Western Plus Monterey Inn for the purpose of engaging in prostitution. Troy McDonald, her companion, was arrested as her pimp. Defendant admitted that she used myredbook.com, which is an escort Web site known for promoting

prostitution. A search of her cell phone revealed text messages with McDonald that corroborated her statement that she was engaged in prostitution.

II. Discussion

A. Background

The probation officer recommended, among other things, that the trial court impose probation conditions regarding social media and cell phones "in order to restrict the defendant from continuing any learned behaviors from the instant offense and allowing probation to monitor possible illegal activity on sites such as 'myredbook.com' or 'backpage.com.'" More specifically, the probation officer recommended that the following probation conditions be imposed: "11. You are prohibited from using any social media accounts and applications without the prior permission of your probation officer. [¶] 12. You must provide any probation officer or other peace officer access to any cell phone device or other electronic device for the purpose of searching social media accounts and applications, photographs, video recordings, email messages, text messages and voice messages. Such access includes providing all passwords to any social media accounts and applications upon request, and you shall submit such accounts and applications to search at any time without a warrant by any probation officer or any other peace officer."

At the sentencing hearing, defense counsel objected to the recommended conditions. She stated: "Item No. 11 and Item No. 12, I'm going to ask the Court to strike in its entirety. A mere speculation by probation should not be sufficient in order to state that these particular items must be provided by Ms. Roldan. [¶] There may have been an undertone of that's what she was doing here in Monterey County. However, there has been no priors and nothing since then, since 2014 when these allegations

occurred, that Ms. Roldan has been in any other illicit-type activity. I believe that that is overbroad, overreaching to this particular case."

The trial court stated: "As to Item 11, I am going to impose that condition. I have thought about it. And when I was first thinking about it, I was thinking that it said that you are not to have any or use any social media accounts. But that isn't what it says. [¶] It says you are not to use social media accounts without the prior permission of your probation officer. [¶] The intention of the Court in this is that social media accounts that would be used to make connections with people who are inappropriate conduct or ones that the probation should be notifying you you should not use. [¶] Social media accounts that you are using to communicate with friends and family members would be ones that the Court would allow you to use. And the probation department would have latitude to determine those. Any social media accounts that you do want to use, you'll need to check with probation. Okay." After imposing Item No. 12, the trial court stated: "I'm going to add another condition that you not erase any of your history from your social media accounts for a period of four months. You need to keep four months worth of history available for probation to search. [¶] You are to provide any passwords to probation so that they can search them also remotely, so that they can get into your social media accounts from -- without actually getting onto your phone." There was no objection to the history retention condition.[1]

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[1] The probation terms in the minute order are the same as those in the probation report. However, the minute order, which was signed by the trial court, does not include the orally imposed term that defendant not erase the history from social media accounts for four months. "'It may be said . . . as a general rule that when, as in this case, the record is in conflict it will be harmonized if possible; but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence [citation]. Therefore whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case.' [Citations.]" (*People v. Smith* (1983) 33 Cal.3d 596, 599.) Here, there is no indication that the trial court intended that the condition in the minute order would modify its prior oral imposition of the condition.

B. Analysis

1. Reasonableness

Defendant objects to the probation conditions regarding the social media permissions, the provision of passwords, and the history retention on reasonableness grounds.

"'[The] failure to timely challenge a probation condition on "*Bushman/Lent*" [(reasonableness)] grounds in the trial court waives the claim on appeal.' [Citation.] 'A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case.' [Citation.]" (*People v. Smith* (2017) 8 Cal.App.5th 977, 985 (*Smith*).)

Here, defendant objected to the probation conditions regarding the social media permissions and the provision of passwords on reasonableness grounds. Since this objection did not preserve her challenge to the history retention condition, it has been forfeited.

"Trial courts have broad discretion to impose such reasonable probation conditions 'as it may determine are fitting and proper to the end that justice may be done . . . and generally and specifically for the reformation and rehabilitation of the probationer . . . .'" (*People v. Chardon* (1999) 77 Cal.App.4th 205, 217; Pen. Code, § 1203.1, subd. (j).) "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*Lent, supra,* 15 Cal.3d at p. 486.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a

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The parties also assume on appeal that the condition adopted by the trial court at the sentencing hearing is controlling. Accordingly, we will review this condition as stated in the reporter's transcript to the extent that any challenge to its constitutionality has not been forfeited.

. . . term." (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) We review the probation conditions under the abuse of discretion standard. (*Ibid.*)

Here, defendant used a fraudulent credit card to book hotel rooms where she engaged in prostitution. She also admitted that she used the Internet to promote her services and she sent prostitution-related text messages. Thus, the conditions restricting defendant's use of social media accounts and applications without the probation officer's permission and allowing the search of these accounts and applications has some relationship to the conduct of which she was convicted.

Relying on *People v. Nassetta* (2016) 3 Cal.App.5th 699 (*Nassetta*), defendant contends that the challenged conditions cannot be considered reasonable.

In *Nassetta*, the defendant was arrested at 2:15 a.m. for driving under the influence and possessing cocaine for sale. (*Nassetta*, *supra*, 3 Cal.App.5th at p. 701.) The trial court imposed a probation condition requiring defendant to observe a 10:00 p.m. to 6:00 a.m. curfew. (*Id.* at p. 702.) The defendant challenged the probation condition on reasonableness grounds. (*Ibid.*) The reviewing court concluded that "the curfew condition bears no relationship to the offenses [the defendant] was convicted of. Neither possession of cocaine for sale nor driving under the influence requires the offense be committed at night. The mere fact that [the defendant] was pulled over at night does not demonstrate a relationship between the curfew condition and the offenses he committed, and the Attorney General does not argue otherwise." (*Id.* at p. 703.) After finding that the other prongs of the *Lent* test were satisfied, the *Nassetta* court held the probation condition was invalid. (*Nassetta*, at p. 707.) *Nassetta* is distinguishable from the present case, because defendant's probation conditions have some relationship to defendant's crime.

Defendant also relies on *People v. Brandao* (2012) 210 Cal.App.4th 568 (*Brandao*) and *In re Mark C.* (2016) 244 Cal.App.4th 520 (*Mark C.*)[2] and claims the challenged conditions bear merely a tangential connection to future criminal conduct. We disagree.

In *Brandao*, the defendant pleaded no contest to possession of a controlled substance. (*Brandao*, *supra*, 210 Cal.App.4th at p. 570.) Though the defendant had never been involved with a gang, none of his family had gang ties, and none of his offenses was gang-related, the trial court imposed a no-gang-contact probation condition. (*Id.* at pp. 570-571.) This court held that the challenged probation condition was not reasonably related to future criminality under *Lent*. (*Brandao*, at p. 576.) In *Mark C.*, there was no relationship between the minor's offense of possession of a weapon on school grounds and the electronic search condition. (*Mark C.*, *supra*, 244 Cal.App.4th at p. 531.) Defendant's reliance on *Brandao* and *Mark C.*, is misplaced. Here, defendant admitted that she used a Web site that promoted prostitution, sent text messages related to prostitution, and committed a burglary to enable her to engage in prostitution. Thus, her future criminality is necessarily linked to her ability to refrain from promoting her services as a prostitute on the Internet or communicating with those who would purchase these services.

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[2] The California Supreme Court has granted review in *Mark C.*, *supra*, 244 Cal.App.4th 520 on April 13, 2016 (S232849) pending consideration and disposition of a related issue in *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923. This case involves the issue of whether a probation condition requiring a minor to submit to warrantless searches of his "'electronics including passwords'" is overbroad. (*Mark C.*, at p. 524.) Review has been granted in several other cases which present similar issues and deferred briefing. (See e.g., *In re Q.R.* (2017) 7 Cal.App.5th 1231, review granted April 12, 2017, S240222; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted December 14, 2016, S238210; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted October 12, 2016, S236628.

In sum, since the probation conditions are related to defendant's crime and reasonably related to preventing future criminality, the probation conditions are valid under *Lent*.

2. Overbreadth

Defendant also contends the probation conditions are unconstitutionally overbroad.

"'[A]dult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights . . . .' [Citation.] 'A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' [Citation.] Under this doctrine, '"'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" [Citations.]' [Citation.] '"A law's overbreadth represents the failure of draftsmen to focus narrowly on tangible harms sought to be avoided, with the result that in some applications the law burdens activity which does not raise a sufficiently high probability of harm to governmental interests to justify the interference." [Citation.]'" (*People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1175 (*Ebertowski*).)

"'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' [Citation.]" (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346 (*Pirali*).) A defendant's claim that a probation condition is unconstitutionally overbroad can be raised for the first time on appeal so long as the claim presents a pure question of law that can be resolved without reference to the sentencing record. (*In re Sheena K.* (2007) 40

Cal.4th 875, 880-889 (*Sheena K.*).) We review the constitutionality of a probation condition de novo. (*Id.* at p. 889.)

Defendant argues that the requirement that she obtain prior permission from her probation officer for the use of any social media accounts is overbroad, because it curtails her free speech rights much more than is necessary to achieve the government's purpose.

Pirali, *supra*, 217 Cal.App.4th 1341 is instructive. In *Pirali*, the defendant was convicted of possession of child pornography after child pornography was found on his computer. (*Id.* at p. 1343.) The defendant challenged the probation condition that he not "'have access to the Internet or any other on-line service through use of [his] computer or other electronic device at any location without prior approval of the probation officer'" as unconstitutionally overbroad. (*Id.* at pp. 1345-1346, italics omitted.)

In *Pirali*, this court discussed three cases: *In re Stevens* (2004) 119 Cal.App.4th 1228 (*Stevens*), *In re Hudson* (2006) 143 Cal.App.4th 1 (*Hudson*), and *People v. Harrisson* (2005) 134 Cal.App.4th 637 (*Harrisson*). (*Pirali*, *supra*, 217 Cal.App.4th at pp. 1348-1350.) In *Stevens*, the defendant was convicted of lewd conduct with a child under 14 and the trial court imposed a parole condition which prohibited all use of the computer and the Internet. (*Pirali*, at p. 1348.) The *Stevens* court held the condition was unreasonable. (*Pirali*, at p. 1349.) In *Hudson*, the reviewing court upheld a parole condition which prohibited the defendant from possessing or having access to computers or the Internet without permission from his parole officer. (*Pirali*, at p. 1349.) In *Harrisson*, the defendant was convicted of possession of child pornography. (*Pirali*, at p. 1349.) The reviewing court held that a probation condition which prohibited the defendant from accessing the Internet was not constitutionally overbroad, because the defendant used the Internet to send pornographic images and solicit sex with minors, discussed a plan to murder the prosecutor, and violated the ban on Internet access. (*Ibid.*)

After considering these cases, the *Pirali* court rejected the defendant's claim that the condition was unconstitutionally overbroad. (*Pirali*, *supra*, 217 Cal.App.4th at p. 1350.) This court reasoned that "like the parole condition contemplated in *Hudson*, defendant is not faced with a blanket prohibition. The probation condition clearly grants defendant the ability to access the Internet on his computer and other electronic devices so long as he obtains prior permission from his [probation] officer. This makes the probation condition distinguishable from the parole condition discussed in *Stevens*, and less restrictive than the probation condition discussed in *Harrisson* that was deemed valid. Defendant may still use the Internet and a computer while at home, or at his place of employment. Defendant may also still continue to access and use the Internet for e-mail, and other methods of online communication, subject to prior approval by his probation officer." (*Ibid.*)

Here, the probation condition prohibiting defendant from "using any social media accounts and applications without the prior permission of [her] probation officer" is less restrictive than the condition found constitutional in *Pirali*. In contrast to the defendant in *Pirali*, here, defendant may freely use the Internet but may only use social media accounts and applications with her probation officer's permission. In our view, the state's purpose in preventing defendant's future involvement in prostitution and other illegal activity by restricting her use of social media accounts and applications outweighs the minimal burden on defendant's First Amendment rights.

Defendant also contends that the requirement that she obtain prior permission from her probation officer for the use of any "applications" is overbroad. She argues that the term "applications" includes "word processing, spreadsheet, tax preparation, music storage and listening programs." In interpreting the language of the probation condition, we read "social media" to modify both "accounts" and "applications," and thus the probation condition restricts defendant's use of "social media" applications. As

previously discussed, the restriction on defendant's use of "social media accounts and applications" is not unconstitutionally overbroad.

Defendant next contends that the electronic devices search condition is overbroad because it violates the Fourth Amendment and her right to privacy. The Attorney General responds that defendant has forfeited the issue. Assuming that the issue has not been forfeited, we reject defendant's contention.

To support her position, defendant relies on the reasoning of *Riley v. California* (2014) ___ U.S. ___ [134 S.Ct. 2473] (*Riley*), in which the United States Supreme Court held that the warrantless search of a suspect's cell phone implicated and violated the suspect's Fourth Amendment rights. (*Id.* at p. ___ [134 S.Ct. at p. 2493].) In reaching its holding, the *Riley* court observed that many modern cell phones have the capacity to be used as minicomputers and can potentially contain vast amounts of information about an individual's life. (*Id.* at pp. ___ [134 S.Ct. at pp. 2488-2489].) The court also cautioned that its holding was that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Id.* at p. ___ [134 S.Ct. at p. 2493].)

Defendant's reliance on *Riley* is misplaced. Here, defendant is a probationer. Thus, she is unlike the defendant in *Riley*, who was searched before he had been convicted of a crime and was still protected by the presumption of innocence. "Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled."' [Citations.] Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*United States v. Knights* (2001) 534 U.S. 112, 119.) Given defendant's status as a probationer, we find no Fourth Amendment violation.

In *Ebertowski, supra*, 228 Cal.App.4th 1170, this court rejected an overbreadth contention. In *Ebertowski*, the defendant was a gang member, who promoted his gang on social media. (*Id.* at p. 1173.) The challenged probation conditions required him to: "'provide all passwords to any electronic devices . . . within his custody and control and . . . submit said devices to search at anytime [*sic*] without a warrant by any peace officer'" and to "'provide all passwords to any social media sites (including Facebook, Instagram and Mocospace) and . . . submit said sites to search at anytime [*sic*] without a warrant by any peace officer.'" (*Ibid.*) This court rejected the defendant's claim that the probation conditions "were not narrowly tailored to their purpose so as to limit their impact on his constitutional rights to privacy, speech, and association." (*Id.* at p. 1175.) This court concluded that the state's interest in preventing the defendant from continuing to associate with gangs and participate in gang activities, which was served by the probation condition, outweighed the minimal invasion of his privacy. (*Ibid.*)

Defendant relies on *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*) in which a different panel of this court distinguished *Ebertowski* and held that a probation condition allowing the search of the defendant's electronic devices was unconstitutionally overbroad. (*Appleton*, at p. 727.) The defendant in *Appleton* was convicted of false imprisonment based on an incident which occurred about a year after he met the minor victim through a social media application. (*Id.* at p. 719.) The probation condition at issue provided that the defendant's computers and electronic devices were subject to "'forensic analysis search for material prohibited by law.'" (*Id.* at p. 721.) The *Appleton* court reasoned that this probation condition "would allow for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential for future criminality. Furthermore, the state's interest here—monitoring whether defendant uses social media to contact minors for unlawful purposes—could be served through narrower means. For example, the trial court could impose the narrower condition approved in

Ebertowski, whereby defendant must provide his social media accounts and passwords to his probation officer for monitoring. Alternately, the court could impose a condition restricting defendant's use of or access to social media Web sites and applications without prior approval of his probation officer. [Citation.]" (*Appleton*, at p. 727, fn. omitted.)

Here, the search conditions properly serve the state's interest in preventing defendant from using her electronic devices to engage in criminal activity, such as prostitution. Unlike in *Appleton*, the search conditions are restricted to defendant's social media accounts and applications. By also allowing the search of "photographs and video recordings, email messages, text messages and voice messages," the condition ensures that defendant is not circumventing the requirement that she receive prior approval of her use of social media accounts and applications. Accordingly, we conclude that the search conditions are not unconstitutionally overbroad.[3]

3. Vagueness

Defendant contends that the probation conditions are unconstitutionally vague, because they, on their face, fail to notify her of what she is forbidden to do and how the probation officer is to monitor her behavior. The Attorney General claims that "[t]he probation officer can reasonably infer that what he [or she] is to monitor is based on the other conditions of probation, i.e., that [defendant] obey all laws, and that she must avoid contact with certain categories of people."

"'[T]he underpinning of a vagueness challenge is the due process concept of "fair warning." [Citation.] The rule of fair warning consists of "the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential

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[3] Defendant contends that the requirement that she not erase her history from her social media accounts for four months is overbroad. Defendant did not object to this condition at the sentencing hearing. Here, since this contention does not present a pure question of law, the issue has been forfeited. (*Sheena K.*, *supra*, 40 Cal.4th at 880-890.)

offenders" [citation], protections that are "embodied in the due process clauses of the federal and California Constitutions."' [Citation.] 'In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that "abstract legal commands must be applied in a specific *context*," and that, although not admitting of "mathematical certainty," the language used must have "'*reasonable* specificity.'"' [Citation.] 'A probation condition "must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated," if it is to withstand a challenge on the ground of vagueness. [Citation.]' [Citation.]" (*Smith*, *supra*, 8 Cal.App.5th at p. 986.) Defendant's objection to the probation conditions as unconstitutionally vague may be raised for the first time on appeal because it presents a pure question of law. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 880-889.)

Here, the probation conditions state: "You are prohibited from using any social media accounts and applications without the prior permission your probation officer;" and "[y]ou must provide any probation officer or other peace officer access to any cell phone device or other electronic device for the purpose of searching social media accounts and applications, photographs, video recordings, email messages, text messages and voice messages. Such access includes providing all passwords to any social media accounts and applications upon request, and you shall submit such accounts and applications to search at any time without warrant by a probation officer or any other peace officer." Thus, the probation conditions inform defendant that she must obtain the probation officer's permission to use social media accounts and applications and make her electronic devices available to the probation officer to search social media accounts and applications, photographs, recordings, and messages. But the probation conditions do not provide notice of what content in defendant's social media accounts and applications is prohibited. Nor are the probation conditions specific enough to inform a

probation officer of what to search for. Accordingly, we will remand the matter to the trial court to modify these conditions to include such language.

Defendant also contends that the history retention condition must be modified to include a knowledge requirement. She argues that she "could unwittingly violate the condition by accidentally deleting her browser history or using software that does so automatically." In *Appleton*, this court rejected an identical contention: "Since there is nothing inherently vague or ambiguous about requiring defendant not to delete his browser history, we perceive no need for an express scienter requirement." (*Appleton*, *supra*, 245 Cal.App.4th at p. 728.) Accordingly, no modification of this probation condition is required.

III. Disposition

The order is reversed. The matter is remanded to the trial court to modify the probation conditions to specify the type of content in defendant's social media accounts and applications which is prohibited.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.